BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit was handed down on the 13th day of April, 1942. It is embraced in the printed record, page 15, and is reported in 127 F. (2) 284.

II.

Jurisdiction.

The case involves a controversy between the trustee in bankruptcy of a Virginia corporation, which corporation was adjudicated a bankrupt by the U. S. District Court for the Eastern District of Virginia, and the trustee in bankruptcy for a Delaware corporation, which was adjudicated a bankrupt by the U. S. District Court for the District of New Jersey. The claim of the Delaware corporation's trustee is in excess of $39,000.00.

III.

Statement of the Case.

The following excerpts from the opinion of the Circuit Court of Appeals (by Judge Parker) fairly state the facts:

> "The Tip Top Tailors was incorporated under the laws of Delaware on January 23, 1939. Its principal place of business was in Newark, N. J., and it operated nine retail stores in various cities of the United States, one of these being located at Richmond, Va. On July 12, 1939 it secured a corporate charter from the State of Virginia for a corporation of the same

name as that under which it was operating and caused three shares of stock, of the par value of $1.00 each, to be issued to its nominees to be held by them for its use and benefit. The officers of the two corporations were the same and no separate corporate activity of any sort on the part of the Virginia corporation is shown to have taken place. No money was paid into its treasury, no contracts were executed by it, no salaries were paid by it, unless the payment of wages to employees of the Richmond store from cash on hand be so regarded, and the only records kept for it were records kept in the office of the Delaware corporation at Newark, N. J. by an employee of that corporation. These records consisted of nothing more than transcriptions from the books of the Delaware corporation made by employees of that corporation at infrequent intervals.

"Except for these book entries, and except for the fact that the Virginia charter was obtained, the Delaware corporation dealt with its Richmond, Va. store precisely in the same way that it dealt with the other stores that it was operating, as to which there was no pretense of separate incorporation.

"On November 20, 1940, the Delaware corporation was adjudged bankrupt and appellant (respondent) Stone, was appointed its receiver. Two days later, two creditors attached the property in the Richmond store as property of the Virginia corporation; and on the following day an involuntary petition in bankruptcy was filed against the Virginia corporation by Stone as receiver of the Delaware corporation. The Virginia corporation was adjudged bankrupt on this petition and Stone, as receiver, thereupon filed claim for the sum of $39,069.67 as the amount owing by the Virginia corporation to the Delaware corporation. The trustee in bankruptcy of the Virginia corporation resisted the allowance of this claim and asked that, at all events, it be postponed to the claims of other creditors on the ground that the Virginia corporation was not a separate entity, but a mere instrumentality or department

of the Delaware corporation, and that the amount claimed was not a true indebtedness arising out of loans and advancements but represented a mere advancement of operating capital.

"The issues thus arising on the objection to the claim were referred to a special master, who filed a report finding that the Virginia corporation was a 'mere shell without reality' and a 'mere agency or corporate pocket' of the Delaware corporation, and recommending that the claim be postponed to the claims of other general creditors of the Virginia corporation. Appellant duly excepted to this report and filed a petition asking, as alternative relief, that the corporate entity of the Virginia corporation be entirely disregarded and that the bankruptcy proceedings relating to that corporation be consolidated with the bankruptcy proceedings of the Delaware corporation, to the end that all creditors of the last named corporation, including those who had proved claims in the Virginia proceedings, share pari passu in the distribution of the consolidated assets. Three creditors of the Delaware corporation filed intervening petitions praying this relief. The District Judge entered order denying this motion and affirming the report of the special master; and from this order the trustee of the Delaware corporation and the three intervening creditors have appealed."

On these facts the Circuit Court decided that the District Court was right in postponing the claim of the parent to the claims of general creditors of the subsidiary, but reversed the trial court and ordered a consolidation of both estates and a pooling of the assets.

To this should be added that the entire estate of the subsidiary corporation, amounting to about $7,000.00 had been reduced to cash and was already in the hands of the Virginia trustee when the New Jersey trustee first asked for consolidation. If the assets of the Virginia corporation are used to pay off creditors who have filed their

claims against it exclusive, of course, of that of the parent's trustee, these creditors may expect to receive nearly the full amount of their claims. If, however, consolidation is ordered and all creditors of both corporations share equally in the pooled estate these creditors may expect to receive only between 25 per cent and 30 per cent of their claims.

IV.

Specification of Error.

The Circuit Court of Appeals erred in ordering consolidation of the two bankrupt estates with a pooling of assets and a sharing of creditors of both corporations *pari passu* in the assets of the pooled estates.

V.

ARGUMENT.

The judgment below involves at least three questions of sufficient importance to warrant granting certiorari, as follows: (1) Administration of the bankruptcy act; (2) Creditor rights against local corporations that happen to be foreign owned and controlled; and (3) Application of local law by a court of bankruptcy.

(1) *The judgment complained of erroneously administers the bankruptcy act in failing to accord local creditors priority as to local assets and in failing to recognize that the trustee of the parent corporation is estopped to deny the corporate existence of the subsidiary by asking for consolidation after he has himself filed a petition of involuntary bankruptcy against the Virginia corporation and filed proof of claim.*

The court below held that it was proper in this case to

ignore the corporate entity of the Virginia (subsidiary) corporation for the purpose of holding that the claim of the parent filed against the subsidiary should be postponed to the claims of general creditors. This holding is based on a long line of cases set forth in the opinion. The reasoning of these cases is perhaps best summarized by Mr. Justice Douglas in the late case of *Pepper* v. *Litton*, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281. There it is said, in speaking of subordination of the claim in bankruptcy of a dominant or controlling parent corporation or stockholder against a subsidiary:

> "And that result * * * is also reached on the facts where the bankrupt has been used merely as a corporate pocket of the dominant stockholder, who, with disregard of the substance or form of corporation management has treated its affairs as its own. And so called loans or advances by the dominant or controlling stockholder will be subordinated to the claims of other creditors and thus treated in effect as capital contributions by the stockholder not only in the foregoing types of situations but also where the paid-in capital is purely nominal, the capital necessary for the scope and magnitude of the operations of the company being furnished by the stockholder as a loan."

But, after reaching the conclusion to subordinate the claim of the parent in the case at bar, the court below went a step further and ordered consolidation of both bankrupt estates, thus, in effect, undoing what had already been done to protect the creditors of the subsidiary and making it necessary for them to travel to another jurisdiction, there to share equally with the creditors of the parent.

If it is inequitable to allow the claim of the parent as a general creditor of the subsidiary, it is also inequitable to force the Virginia creditors to journey to New Jersey to share with the creditors of the bankrupt parent.

And the vice of this result is not cured by holding, as the court below did, that if Virginia creditors have equities with respect to the assets of the Virginia corporation, these may be litigated in the New Jersey forum, for the bankruptcy act specifically provides (Bankruptcy Act Sec. 32; U. S. Code, Title 11, Ch. 4, Sec. 55), that in the case of two or more courts acquiring jurisdiction of bankruptcy proceedings against the same person the causes would be consolidated "in the court which can proceed with the same for the greatest convenience of the parties in interest".

The convenience of the parties in interest, therefore, should be the sole criterion in the case of consolidation and even then, consolidation can only be ordered where the several proceedings involve, "the same person". In the case at bar, however, the two proceedings are not against "the same person", since we are dealing here with a Delaware corporation and a Virginia corporation, each one a creature of the corporation law of their respective states. And how can it be said to be for the "convenience" of the Virginia creditors to force them to convene in the New Jersey court and prove and litigate their claims once again after they have already done so in the Virginia forum?

But, apart from the application of this particular section of the Bankruptcy Act, the larger question involves the administration of this estate in bankruptcy with total disregard for the rights of the Virginia creditors. The equitable doctrine of disregarding the corporate entity was invented by the courts to enable them to protect the rights of innocent parties involved, and yet in the judgment in question, it is used in such a way as to deny to the local creditors the right to subject the local assets to the payment of their claims. This weapon of equity should be used guardedly and not wantonly.

> "Though equity may in certain situations disregard the artificiality of a corporate structure which is merely

a form to shield a fraud, it is not justified in disregarding the entity merely to assist a party to escape a valid obligation into which he has voluntarily and beneficially entered". (*Goldberg* v. *Tri-States* (C. C. A. 8) 126 F. (2), 26, Syl. #8.)

"As was stated by the Supreme Court of Pennsylvania in *Markovitz* v. *Markovitz*, 336 Pa. 122, 126; 8 A. (2) 36, 38, 'the fiction of a corporation as an entity distinct from the aggregate of individuals comprising it, was invented to serve convenience and justice. There is consequently an exception recognized wherever the rule is known, namely, that the fiction will be disregarded and the individuals and corporation considered as identical whenever justice or public policy demand it, *and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless*'." (Emphasis supplied.) (*Roomberg* v. *U. S.*, 40 F. Supp. (D. C. Pa.) 621.)

"It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented but for every other purpose it may be contradicted." (*Schmid* v. *First Camden National Bank* (N. J.) 22 A. (2) 246.)

"Where both the parent and its subsidiary are insolvent it is often necessary to preserve their separate entities *in order to do justice to their respective creditors.*" (Emphasis supplied.) (*Tennessee Consolidated Coal Co.* v. *Home Ice & Coal Co.* (Tenn.) 156 S. W. (2) 454.)

It should be said at this point that the Circuit Court in the case in judgment misconstrued the evidence in arriving at its conclusion for it held that the Virginia corporation never did business under its charter and that no credit was extended it as such. These conclusions, however, are directly contrary to the special master's findings which were approved by the District Court. The master found as follows:

"In November, 1939, this corporation (the Virginia

> corporation) opened a store at 602 West Broad Street fully equipped and operated it for approximately one year during which time it incurred various debts. * * *"

The record shows, therefore, that, far from having failed to use its corporate charter rights in any way, it actually operated under its charter as a retail store on the busiest street of the City of Richmond for twelve months. Without the permission of the State of Virginia as represented by its charter it could not have operated its store at all. Its corporation name was emblazoned on its store front and the public, as is the case with all such retail stores, was invited to come in and trade with it as a Virginia corporation. As is shown by the creditors who extended it credit for advertising it must have advertised extensively, and, of course it advertised its Richmond store. It is therefore impossible to see how the Circuit Court could have reached the conclusion that it never used its corporate charter in any manner.

The Circuit Court likewise concluded that no credit was extended the Virginia corporation as such. However, on this precise point the master's report states:

> "On the other hand, the creditors of the Virginia corporation extended credit solely to this corporation who had been held out to them as being independent and in full control of its own assets".

Apart from the force and effect of the master's findings on this point, which seem to have been wholly overlooked by the Circuit Court, it should be remembered that all of these Virginia creditors, when invited to do so by the action of the trustee of the parent corporation in forcing the Virginia corporation into bankruptcy, came into court and proved and filed their claims *against the Virginia corporation.* In thus proving their claims they made solemn oath in writ-

ing that the bankrupt corporation was justly and truly indebted to them in the amounts indicated.

The legal force and effect of a proof of claim is well settled. It is evidence of the debtor and creditor relationship of the very best sort, especially where no objections are filed. (See Collier on Bankruptcy 14th ed. Vol. 3, Sec. 57.13; Remington on Bankruptcy 4th ed., Vol. 2, Sec. 1007.50; C. J. (2nd) Vol. 8, P. 306).

The creditors of the Virginia corporation are now penalized in the judgment in question for failing to show at the time they proved their claims that credit was extended to the Virginia corporation and not the Delaware parent. But it should be borne in mind that there was no necessity at that time for such proof. No one was questioning their having credited the local store and it would have been a vain act for them to have undertaken to produce evidence of a fact which was not questioned and as to which their sworn proofs of claim under the Bankruptcy Act were ample proof.

The opinion of the court below in this case contains a number of citations as authority for the proposition that consolidation of these two estates is the proper procedure. However, it should be said that not a single case has been found in which consolidation has been ordered *in disregard of the rights of the respective creditors.* In the case of *in re Foley* 4 F. (2nd) 154, the court held that consolidation of the two estates was erroneous but refrained from undoing what the lower court had done on the grounds that the rights of the creditors could be fully protected without such action. This case is cited by Remington on Bankruptcy, 4th ed. Vol. 1, Sec. 338, N. B. 40 where the decision is interpreted as follows:

> "There should be no consolidation of different bankruptcy proceedings, nor should the same trustee be appointed for both estates when the interests of the

> creditors of the two estates are likely to conflict, and in any event objecting creditors should be given a hearing on the question of consolidation * * *"

In the case of *Salt Lake Canning Co.* v. *Collins*, 176 F. 91, the court expressly stated that its only object in consolidation was to protect the creditors of each estate, for the court distinctly said that they would thus be protected by a single administration, which would not entail the burden of double expenses and costs. But in the case at bar, the attendant burden of expenses and costs has already attached in the case of the Virginia corporation and instead of there being a saving to the creditors by a consolidation it will mean only added expense and costs.

In the case of *Alaska American Fish Co.*, 162 F. 498 and *Tiller Building Co.* v. *Reynolds*, 247 F. 90, it does not appear that any creditors of the subsidiary appeared or objected in any way.

In *Southwestern Bridge & Iron Co.*, 133 F. 568, consolidation was ordered by the court. Here the court distinctly stated that its prime object in so doing would be protection of the two sets of creditors and that consolidation was made necessary by the intermingling of the assets and affairs of both corporations.

In *Carroll* v. *Stern*, 223 F. 723, where consolidation of two bankrupt estates was ordered, the court went out of its way to state expressly that the assets of each should be held in trust for their respective creditors. On page 725 of the opinion the court says:

> "The result by which the assets of a separate—and, as the event proved, solvent—corporation were brought for administration into the estate of another, and certainly a bankrupt corporation, was an unusual result. It has been acquiesced in and cannot be questioned; but the bankrupt estate which has thus presumptively profited from the exercise of such a power, should do

> equity to the fullest extent. The bankruptcy trustee was ultimately entitled only to the surplus which should remain out of the Duhme (the solvent subsidiary) assets after the payment of all debts which properly attach to those assets. Thus the property came to the trustee charged with a prior trust * * *"

In *Fish* v. *East*, 114 F. (2nd) 177, the concern of the court for the rights of the respective creditors is again expressed and on page 199 of the opinion the Court said:

> "Creditors of the Placers Co. (subsidiary) though it be an instrumentality of the Mines Co. (the parent) may be entitled to be paid from the Placers Co. in preference to the claims of the Mines Co."

In the opinion of the court below the case of *Trustees System Co. of Pa.* v. *Payne*, 65 F. (2nd) 103, is cited and quoted from at length. However, it should be noticed that in the opinion on page 107 thereof, Judge Woolley says:

> "If the structure as originally conceived is left undisturbed, the receivers of the parent corporation can do very much as the parent corporation did before the receivership, that is, drain off assets from the subsidiary and dispose of them without ancillary receivership to guard local assets and watch over local creditors, thus leaving the local corporations financially dry and compelling the creditors to betake themselves to Chicago" (the home office of the parent corporation).

And further on in the opinion (p. 108) Judge Woolley again emphasizes the necessity for safeguarding the rights of the local creditors as follows:

> "If a main receivership be granted for a solvent corporation, its solvency does not prevent a court in another jurisdiction from appointing ancillary receivers * * * which is what the court below did in fact as to one receivership and in principle as to the others, *not*

> *to wind them up but to protect local creditors as to local assets in the administration of their affairs.''* (Emphasis supplied.)

And finally, this Court has spoken on this subject in definite and precise terms. In the case of *Sampsell* v. *Imperial Paper & Color Corporation,* 313 U. S. 215, 61 S. C. 904, 85 L. Ed. 1293 (opinion dated April 28, 1941) Mr. Justice Douglas analyzes the situation when a creditor of a corporation that is set up as the ''alter ego'' of the dominating stockholder claims priority in the assets of the corporation in competition with the trustee of the insolvent stockholder. The holding of the Court is that where there has been a fraudulent transfer by the stockholder to the corporation with the full knowledge and consent of the creditor, the assets of the corporation and of the stockholder should be administered together and the creditor denied the priority he seeks.

But, says Mr. Justice Douglas, in the normal case where there has been no question of a fraudulent conveyance *creditors of the corporation are entitled to priority in the administration of its assets over the claims of creditors of the insolvent dominant stockholder:*

> ''All questions of fraudulent conveyances aside, creditors of the corporation normally would be entitled to satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholder.''

And that is the case now before this Court. The trustee of Virginia corporation is simply asking that the assets of this corporation, itself forced into bankruptcy by the action of the bankrupt parent's trustee, be applied to the payment of the claims of the local creditors.

It should be also borne in mind that in the *Tip Top Tailors* case all the assets of the Virginia corporation had

been taken possession of and reduced to cash by the Virginia trustee before any question of consolidation arose. Hence, there has been actual possession by the Virginia creditors of these assets so that the case again falls within the language of Mr. Justice Douglas in the *Sampsell* case when he says:

> "To be sure, creditors of a fraudulent transferee have at times been accorded priority over the creditors of the transferor where they have 'taken the property into their own custody'. 1 Glenn, Fraudulent Conveyances and Preferences (1940) Sec. 238. CF. O'Gasapian *v.* Danielson, 284 Mass. 27, 187 N. E. 107, 89 ALR 1159. The same result obtains in the case of bona fide lien creditors of the fraudulent transferee".

Considerations of estoppel and election of remedies also are pertinent to the issues here raised. In petitioning for a consolidation the trustee of the parent is in effect disavowing the action of his predecessor in title, and asking this Court to treat the Virginia corporation as though it has never in fact been incorporated. This he cannot do. 18 CJ (2) 510, 511, 520; *Payne* v. *Brachen* (Tex.), 90 S. W. (2) 607; *Clausen* v. *Head*, 85 N. W. 1028; *Mauritz* v. *Schwind*, 101 S. W. (2) 1085.

The real estoppel in this case arose out of the original act of incorporation and the subsequent holding out to the public in Virginia. This situation was inherited by the parent corporation's trustee and therefore fixed his rights and liabilities in this proceeding. He should now be precluded from taking a position inconsistent with that of the incorporators, whom he represents in the bankruptcy court.

Furthermore, at the inception of this litigation, which he himself precipitated, the parent corporation's trustee had his election of remedies. He chose to treat the Virginia corporation as a separate legal entity and accordingly filed

an involuntary petition against it. He thereby caused to be convened all of its creditors and invited them to come forward and prove their claims. There was never any question as to whether or not the local creditors had in fact given credit to the Virginia corporation or to some other corporation, and so there was never any necessity for evidence on this point apart from the usual proofs of claim. Indeed, if for any reason of foresight or prescience, evidence on this point had been offered, it could, and doubtless would, have been objected to as irrelevant and unnecessary.

It was not until all the evidence was closed and the Master's report thereon filed, or about to be filed, that the petition for consolidation was filed. The precise question, therefore, was never raised in this case until the evidence was closed so that the Virginia creditors were denied the opportunity to present any evidence at all on the very point on which the circuit court based its decision.

On the other hand, if the parent corporation's trustee had proceeded in the first instance in the manner recommended by the circuit court in its opinion:

> "The better procedure to defeat the attachment levied upon the assets in Virginia would doubtless have been the institution of bankruptcy proceedings ancillary to those pending in New Jersey."

then, in that event the issue would have been whether or not the local creditors gave credit to the Virginia or to the parent corporation. In such a case there would have been ample opportunity to bring forward evidence on this point. But because the New Jersey trustee elected to proceed in a manner which the circuit court says was "mistaken", the Virginia creditors are precluded from bringing forward this evidence, and the court below has told them that the lack of such evidence in the record is fatal to their case.

We know of no rule of law or equity which places a

trustee in bankruptcy, even if he is acting as an officer of a court, on a different plane from any ordinary litigant. When a trustee or other officer of a court goes into another court as a party litigant and makes an election of remedies which fixes the rights and liabilities of innocent parties in the same litigation, he should not be permitted to escape from the consequences of his election under the cloak of judicial immunity.

Again, this brings the case within the purview of the *Sampsell* case where it is said:

> "And estoppel or other equitable considerations may well result in the award of priority even to unsecured creditors of the transferee, the conveyance being good between the parties."

(2) *The decision of the Circuit Court is in error because of its effect on creditor rights against corporations that happen to be foreign owned or controlled.*

When the promoters of this business came into the State of Virginia for the purpose of opening up a Richmond store, they had the choice of two methods of operating: (1) As a domesticated foreign corporation; (2) As a Virginia corporation. They elected the latter course and secured a charter as a Virginia corporation. For a year the Richmond store operated under its Virginia charter, the parent corporation fully stocking and equipping it and thus holding it out to the general public as being in full control of its assets. When its creditors, however, seek to subject these apparent assets to the payment of their claims, they are told that because of secret manipulations whereby the parent corporation never permitted the subsidiary any independence of existence the assets will be pooled with those of the bankrupt parent.

The danger to the business public of any such doctrine as this is at once apparent. If it is to be followed, local

creditors will never know whether they can deal in good faith with a business which has been granted a corporation charter by the State of Virginia, and which, in pursuance of said charter, opens up and operates a store or other establishment in the corporate name. Whether or not the new corporation's apparent assets are in reality its own for the ultimate benefit of its creditors would depend on the private management methods employed between the local corporation and its foreign backers.

Thus, the mischief created by this revolutionary decision is greater than the supposed evil it is designed to cure. The opinion of the Circuit Court concludes that the creditors of the parent corporation have an interest in these assets and for that reason orders consolidation. However, it would seem that the local creditor rights with respect to the assets of the local corporation should certainly be accorded priority over any supposed rights of creditors of the parent.

If this decision of the Circuit Court of Appeals of the Fourth Circuit is affirmed, one result would be the placing of the burden on local creditors of investigating the secret management and operating methods employed between the subsidiary and its parent. The creditor would thus have to find out as best he could whether or not the parent was in fact treating the subsidiary as merely a "pocket or instrumentality" or whether it was allowing it to operate as a wholly independent entity.

The purpose of an incorporation is, in the first place, to set up a non-conductor of liability between creditor and stockholder. The creditor, if he deals with the corporation, can look only to the corporation itself, and to its assets, for payment. With this purpose in view, the backers of this enterprise, when they came into Virginia, chartered a Virginia corporation and thus sought to insulate themselves from liability to the new corporation's creditors.

They stocked the new corporation's store in Richmond and thereby invited local creditors to give it credit on the faith of its corporate existence and its apparent assets. But when these creditors seek to reach those assets, after having been convened in the bankruptcy proceeding, they are met with the argument that because of the secret and private manipulations between parent and subsidiary they must share *pari passu* with the creditors of an insolvent parent corporation lurking somewhere in the background.

A corporate charter is a contract. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629.

It is a contract between the state and the corporators or members:

> "The charter of a corporation * * * is a contract between the corporation or the corporators or members, and the state. It is a contract between the state and the corporation, between the corporation and the stockholders, and between the stockholders and the state. This contract, on the one hand places the corporation under an obligation to perform the duties to the public which it has undertaken under the charter and it cannot without the consent of the state change its terms nor absolve itself from its obligation." (14 C. J. 161, 162.)

Speaking of the nature of a corporation franchise, Ruling Case Law has this to say:

> "* * * Franchises spring from contracts between the sovereign power and private citizens made upon a valuable consideration for purposes of public benefit as well as individual advantage". (7 R. C. L. P. 87.)

It is therefore clear then that the corporation charter between the promoters of Tip Top Tailors on the one hand and the State of Virginia on the other was a contract in which the public, as represented by the local creditors, has

an interest. But this interest is completely overlooked by the judgment in question.

It is therefore respectfully submitted that the force and effect of the judgment complained of is to throw into the discard the entire theory of corporation liability and to nullify the effect of the solemn corporate contract between the State of Virginia and its chartered creature to the detriment and confusion of the business public.

(3) *The judgment complained of is in direct contravention of local law as represented by the Virginia Traders' Act.*

When the promoters of this enterprise outfitted their Richmond store and placed therein a full line of merchandise they brought themselves squarely within the terms of Section 5224 of the Code of Virginia. This Section provides as follows:

> "If any person transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and co.,' and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; *or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person.*" (Emphasis supplied.)

The purpose of this statute is to protect creditors who extend credit to merchants on the strength and faith of stock and assets which are placed in his public place of business. The statute makes all such stock and merchan-

dise assets for the benefit of creditors, regardless of liens, reservations of title, etc.

When, therefore, the Tip-Top Tailors store was opened in Richmond under and by virtue of its Virginia corporation charter and fully stocked and equipped, these assets became, by virtue of the force and effect of local law, a primary fund for the satisfaction of local creditors. And, of course, the Federal Courts are bound by such local law.

In the case at bar, therefore, when the local corporation was forced into bankruptcy and its trustee took possession of all of such stock of merchandise and equipment, this amounted to a direct appropriation of these assets for the benefit of creditors who should come into the bankruptcy court and prove their claims. This having been done, the judgment of the Circuit Court of Appeals has the effect of utterly nullifying the protection afforded local creditors by the Traders' Act.

The Supreme Court of the State of Virginia has construed and given effect to this statute in many cases. For instance, in *Capitol Motor Corporation* v. *Lasker,* 138 Va. 630, the Court said:

> "* * * We are of the opinion that a proper construction of the 'Traders' Act' (Sect. 5224) is that the act is applicable only to property, stock, etc., used in the business of the trader, i. e., property stock, etc., which constitutes in whole or in part the apparent assets of the business of the Trader at the time in question; and that the creditors who are entitled to claim the benefit of such act are lien creditors only or some representative of theirs such as the trustee * * *".

Also in the case of *Nusbaum* v. *City Bank, etc., Co.,* 132 Va. 54, the Court said (page 60):

> "In *Chesapeake Shoe Company* v. *Seldner,* 122 Fed. 594, 58 C. C. A. 261, it is held that the trustee in bank-

ruptcy of a merchant doing business in this State in his own name, takes title, under the Virginia statute, to all the stock in his store, including goods held by him on consignment to which he had no title or between himself and the consignor. In the recent case of *Virginia Book Co.* v. *Sites*, 254 Fed. 46,165 C. C. A. 456, this appears: The bankrupt trader had been for a year or more the local agent of the Virginia Book Co., at Salem, Va., for the sale on commission of school books, consigned to him under an unrecorded contract by which the legal title of the books remained in the book company. Two days before the petition in bankruptcy was filed, and when the book company had reasonable cause to believe that the trader was insolvent, it cancelled his agency and repossessed itself of such of the books as he then had. Upon petition of the trustee in bankruptcy, it was held that by virtue of the traders' act and its construction by the Virginia courts, the trustee could recover, and that the return of the books to the consignor under such circumstances was a voidable preference under the bankrupt act. (U. S. Comp. St. 9585-9656.)"

Since, under *Erie* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, this Honorable Court is bound to follow the law of Virginia, it should reverse the Circuit Court and allow administration of the Virginia corporation's estate for the benefit of its creditors.

Conclusion.

It is therefore respectfully urged that this case is one calling for the exercise by this Court of its supervisory powers in order that the orderly administration of the estate in bankruptcy of this Virginia corporation may continue to the end that all of its assets may be used for the benefit of its creditors.

Respectfully submitted,

ROBERT HUGH RUDD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

STUART A. EACHO, TRUSTEE IN BANKRUPTCY FOR TIP TOP TAILORS (VIRGINIA) INCORPORATED, BANKRUPT,
Petitioner,

vs.

GERALD D. STONE, TRUSTEE IN BANKRUPTCY OF TIP TOP TAILORS INC., A DELAWARE CORPORATION, BANKRUPT; MEINHARD-GREEFF & CO., INC.; CROMPTON-RICHMOND CO., INC., AND JOHN P. MAGUIRE & CO., INC., CREDITORS OF TIP TOP TAILORS, INC., A DELAWARE CORPORATION, BANKRUPT,
Respondents.

MOTION.

To the Honorable, the Supreme Court of the United States:

Now comes your petitioner, Stuart A. Eacho, trustee in bankruptcy for Tip Top Tailors (Virginia) Incorporated, bankrupt, and respectfully moves the Court that the complete record in this case not be printed, but that the petition for certiorari heretofore filed may be considered by this Honorable Court upon the appendices to the brief in the Circuit Court of Appeals, as supplemented by the proceedings in said Circuit Court of Appeals.

Respectfully submitted,

R. HUGH RUDD,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 270.

STUART A. EACHO, Trustee in Bankruptcy for Tip Top Tailors (Virginia), Incorporated, Bankrupt,

Petitioner,

vs.

GERALD D. STONE, Trustee in Bankruptcy of Tip Top Tailors, Inc., a Delaware Corporation, Bankrupt; MEINHARD GREEFF & CO., INC.; CROMPTON-RICHMOND CO., INC.; and JOHN P. MAGUIRE & CO., INC., Creditors of Tip Top Tailors, Inc., a Delaware Corporation, Bankrupt,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

ANSWER TO MOTION WITH RESPECT TO THE RECORD AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CITATIONS.

Supreme Court of the United States

OCTOBER TERM, 1942.

STUART A. EACHO, Trustee in Bankruptcy for Tip Top Tailors (Virginia), Incorporated, Bankrupt, Petitioner, *vs.* GERALD D. STONE, Trustee in Bankruptcy of Tip Top Tailors, Inc., a Delaware Corporation, Bankrupt; MEINHARD-GREEFF & Co., INC.; CROMPTON-RICHMOND Co., INC.; and JOHN P. MAGUIRE & Co., INC., Creditors of Tip Top Tailors, Inc., a Delaware Corporation, Bankrupt. Respondents.	No. 270. On Petition for Writ of Certiorari.

ANSWER TO MOTION WITH RESPECT TO THE RECORD AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Answer to Motion With Respect to the Record.

The petition for a writ of certiorari is accompanied by a motion which proposes that the complete record in this cause should not be printed, but that the petition may be considered by this Court upon the appendices to the brief in the Circuit Court of Appeals, as supplemented by the proceedings in that Court. While petitioner's motion sets forth its object, it fails to state any facts upon which it is based as is required by Rule 7, Paragraph 1 of the United States Supreme Court Rules.